Supreme Court, U. S.
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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-634

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED NOVEMBER 22, 1974. CERTIORARI GRANTED JANUARY 20, 1975

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*A copy of the opinion of the United States Court of Appeals for the Ninth Circuit was filed as Appendix A to the petition for a writ of certiorari (pp. 1a-24a). The judgment of the court of appeals was reproduced as Appendix B to the petition (p. 25a), and the order of the court denying rehearing and rejecting the suggestion for rehearing *en banc* was reproduced as Appendix C (p. 26a).

CRIMINAL DOCKET

UNITED STATES DISTRICT COURT

No. 12113

THE UNITED STATES

vs.

1. TOMMIE LEWIS BROWN
2. VIRGIL DAVID SWAIN
3. JONATHAN RAY NOBLES
4. ROBERT LEE NOBLES

18 USC 2113 (a), (d): Robbery of National Bank; Use of Dangerous Weapon

RELEVANT DOCKET ENTRIES

Date	*Proceedings*
3/ 5/73	Ent ord for flg Indict & for fixg bail at the following for each deft: Bail set as $50,000.00 C/S as to deft Brown. Bail set at $25,000.00 C/S as to deft Swain. Bail set at $75,000.00 C/S as to defts J. R. Nobles & R. L. Nobles & for the issue of B/W as to each deft. Fld Indic & issd B/W as to defts J. R. Nobles & R. L. Nobles. Md JS-2 (LTL-Crim Cal)
3/12/73	Deft Jonathan Ray Nobles is not present is—FUGITIVE. Deft Robert Lee Nobles is not present is—FUGITIVE Fld Designation of Marguerite A. Broady as retained cnsl for deft Brown. Fld Designation of Edward Gritz as retained cnsl for deft Swain. Fld Signed Statement of Deft's Constitutional Rights by each deft pres. Defts are arr & State T/N is as chrgd. Crt ords this case as to all defts assigned to the cal of Judge Malcolm. M. Lucas & conts matter to 1:30 pm this date for all fur procdgs. (VST)
3/20/73	Fld Note of bail hrg purs to 18 USC 3146 bef (MML) at 1:30 on 3/22/73. fb As to deft Robert Lee Nobles.
3/19/73	Ent proc. Deft Robert Lee Nobles pres w/cnsl & is arr. & pleads Not Guilty to the Indict. Trial date set for 4/3/73, 9:30AM. (MML) Fld deft Robert Nobles stmt of Constutl Rights. Fld deft Robert Nobles financial affidavit-EJA23. fb
3/22/73	Ent procs: Hrg deft Nobles mtn for reductn of bail. Deft. pres w/cnsl. Mtn arg to Crt & Mtn denied. (MML) Fld Deft Nobles' Bail reform Act Form #1. an

4/ 4/73	Fld deft Robert Nobles ExParte mtn for the authorization & the issue of an out-of-district subp ord denied 4/4/73 by MML; affid of Nicholas R. Allis.
4/ 9/73	Fld Ex Parte Mot of deft Nobles through DFPD Nicholas R. Allis for the authorization for Expert Services and the issuance of an OUT-OF-DISTRICT Subpoena with Memo of pts & auths & affid of Nicholas R. Allis in suppt w/Order (UNSIGNED). rjf retnble 4/10/73, 9:30 AM bef (MML). rjf
4/10/73	Ent Proc: All defts except deft Jonathan Ray Nobles who is still a fugitive (1st day) pres w/cnsl. Jury is impaneled & swn. Mkd exhs & swore witns. Defts dscvy mtns are denied. Deft Nobles motn for apptmnt of expert is grnted. Cont to 4/11/73 for fur trial. Fld mtn to restrain & enjoin US aty & supversior. Fld jury instr form. (MML) fb
4/11/73	Ent Proc8: Fur J/T (2nd day). All defts pres w/cnsl. Mkd exhs &sw witns. Cont to 4/12/73, 9:30AM. (MML) fb
4/16/73	Fld Mot of GOV'T to exclude testimony of Dr. Robert Buckhout, with pts & auths in suppt. rjf
4/12/73	Ent procs: Fur J/T (3rd day). All defts pres w/cnsl. Mrks exhs & swore Wtnes. Mttr cont to 4/17/73, 9:30 A.M. (MML) Fb
4/17/73	FUR JURY TRIAL (4th day): Defts pres w/cnsl. Mrkd exhbts & sw witns. Cont to 4/18/73 at 9:30 am. (MML) Fld lists of Witns & Exhbts. Fld Deft Nobles offer of profe for testimony of John R. Bond. Fld Deft Nobles opposition to ord compelling deft to previde govt w/notes of witnes interview. (MML) an
4/18/73	FUR JURY TRIAL (5th Day): Defts pres w/cnsl. Mrkd exhbts & sw witns. Closing args hrd. Jury instructed & retires at 2:25 pm to deliberate. Jury retns at 6:05pm & is excused until 4/19/73 at 9:30am. (MML)
4/19/73	FUR JURY TRIAL (6th Day): All defts pres w/cnsl. Jury resumes delib at 9:30 am. At 1:55pm Jury retns w/verdict finding all said defts Guilty as chrgd. Jury is possed & excused. Defts ord to P/O for I&R & matter cont to 5/21/73 at 1:30pm for sent. (MML) Is Issd abstr to P/O. Fld Jury notes 3,4,5. Fld Verdicts. an
3/20/73	Fld B/W as to deft Robert Lee Nobles retnd exec. cd
5/21/73	Ent Procs: Sentence of deft R. L. Nobles. Deft pres w/cnsl. Deft committed to custody of A/G for 25 yrs under 18 USC 4208(a)(2). Deft advsd of right to appeal. (MML) Fld Judgmt Ent 5/23/73. MD JS-3.

6/ 1/73	Fld NOTICE OF APPEAL as to deft Robert Lee Nobles appealing from Final Judgment dated 5/21/73 & flg fee waived as cnsl Nicholas R. Allis, apptd by Court. Fld Motion to proceed in Forma Pauperis and Certificate, Attorney Certification signed by atty Nicholas R. Allis & Designation of Record on Appeal signed by Atty Nicholas R. Allis & AUSA Darrell MacIntyre & Ord (MML) thereon GRANTING appeal in Forma Pauperis as to said deft. Entered 6/1/73. Issd required copies. ag
7/11/73	Fld org. 2 cys and Clerk's file cy of rptr's transcript of proedgs had on Apr. 10, 11, 1973 (vol 1); Apr. 12, 1973 (vol 2); Apr. 17, 18, 19, 1973 (vol 3) Issd and fwd to C/A orig and 3 cys of rec on appeal along with orig 2 cys and Clerk's file cy of rptr's transcript of predgs had on Apr. 10, 11, 1973 (vol 1); Apr. 12, 1973 (vol 2); Apr. 17, 18, 19, 1973 (vol 3) (no exhbts fwd at this time)
6/27/73	Fld cc Judgmt & Comm as to deft Robert Lee Nobles retnd exec at U.S.P., McNeil Isl., Steilacoom, Wash. cd
8/ 7/73	Fwd to C/A cy of rec on appeal along with cy of reptr's transcript of predgs had on Apr 10, 11, 1973; (vol 1); Apr. 12, 1973 (vol 2); Apr. 17, 18, 19, 1973 (vol 3) fld this date.
2/ 6/74	Fwd to C/A Plaintiff's Exhibits 3 through 6 as supplemental rec. cw
8/30/74	Rec'd frm C/A Plaintiff's Exhibits 3 through 6
10/ 4/74	Rec'd fr C/A cc of jdgmt of C/A (defts Brown, Swain and Nobles) reversing in part, affrmg in part and remanding to USDC (gave to Ct Clerk DH — cy to DM)
10/25/74	Rec'd fr C/A cy of ord of C/A denying "mot for reasonable bail, etc. (cy to Ct Clerk DH)

[Filed March 5, 1973, Clerk, U.S. District Court, Central District of California, by Andy Nelson, Deputy]

United States District Court for the Central District of California

September 1972 Grand Jury
No. 12113 CD

UNITED STATES OF AMERICA, PLAINTIFF

v.

TOMMIE LEWIS BROWN, VIRGIL DAVID SWAIN, JONATHAN RAY NOBLES, and ROBERT LEE NOBLES, DEFENDANTS

Indictment—(18 U.S.C. Sec. 2113 (a), (d): Robbery of National Bank; Use of Dangerous Weapon)

The Grand Jury charges:

(18 U.S.C. Sec. 2113(a)(d))

On or about February 6, 1973, in Los Angeles County, within the Central District of California, defendants TOMMIE LEWIS BROWN, VIRGIL DAVID SWAIN, JONATHAN RAY NOBLES and ROBERT LEE NOBLES, by force and violence and by intimidation, knowingly and willfully took from victim tellers Beryl Berman, Peter Van Gemeren, and Elaine Zanders, $4,051.00, belonging to and in the care, custody, control, management and possession of the Crocker National Bank, Pico-Bronson Office, 4117 West Pico Boulevard, Los Angeles, California, a national bank, a member bank of the Federal Reserve System and a bank whose deposits were insured by the Federal Deposit Insurance Corporation.

In committing the offense heretofore charged, defendants TOMMIE LEWIS BROWN, VIRGIL DAVID SWAIN, JONATHAN RAY NOBLES and ROBERT LEE NOBLES assaulted and put in jeopardy

the lives of Beryl Berman, Peter Van Gemeren and Elaine Zanders by the use of dangerous weapons and devices.

A true bill.

SHIRLEY A. REUTER,
Foreman.

William D. Keller,
WILLIAM D. KELLER,
United States Attorney.

I hereby attest and certify on February 21, 1975, that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody. Clerk, U.S. District Court, Central District of California, By (illegible), Deputy.

EXCERPTS FROM THE TRIAL TRANSCRIPT

* * * * *

DIRECT EXAMINATION OF PETER VAN GEMEREN

* * * * *

By Mr. MACINTYRE:

[22] You say you saw two other men at the front of the bank?

A. Yes, I did.

Q. Do you see either of those two men in the courtroom today?

A. One.

Q. Would you point him out.

A. The man all the way at the end, the blue suit.

Mr. MACINTYRE. May the record reflect the witness has identified the defendant Robert Nobles.

The COURT. Yes.

Mr. MACINTYRE. All right.

Q. Would you place a 3 on the government's Exhibit Number 2, a D3, where you saw the defendant Robert Nobles.

A. [Witness complies.]

Q. You have put that D3 right at the entrance [23] of the bank?

A. Yes.

* * * * *

[33] Q. How long would you estimate that the men were in the bank?

A. Five, seven minutes.

Q. Five to seven minutes?

A. Yes.

Q. Okay. Just one moment, sir.

How would you describe the clothing worn by the defendant Robert Nobles as you have identified him as standing under the surveillance camera at the door?

A. It looked similar.

Q. How would you identify his clothing? What if anything did he have on his head?

A. I'm not positive.

* * * * *

CROSS EXAMINATION OF PETER VAN GEMEREN

* * * * *

By Mr. ALLIS:

[38] Q. Do you recall whether the man under the surveillance camera was faced towards you or away from you?

A. I don't recall.

Q. Do you recall whether his side was to you at any time?

A. Yes, I think so.

[39] Q. How long a time would that have been?

A. Half a minute.

Q. Do you recall whether his back was towards you at any time?

A. Yes.

Q. For how long a time was that?

A. Most of the time.

* * * * *

[58] Q. Was it the bank robber under the surveillance camera?

A. Yes.

Q. Then did you state to the FBI that——

Mr. MACINTYRE. Your Honor, objection to this type of questioning. It is improper cross examination.

What counsel is doing is reading from a 302 interview of this witness with the FBI, and it is improper cross examination. He is asking compound questions that go through the whole sheet.

Why not just have the witness read the sheet?

[59] The COURT. You may approach the bench, gentlemen.

* * * * *

The COURT. All right. Let's get to the point.

The objection is overruled.

[65] * * * * *

By Mr. ALLIS:

Q. Is it your testiony that because this interview was many weeks ago, you cannot recall many of the details of your description?

Mr. MACINTYRE. Objection, Your Honor. That is not his testimony. His testimony is that he cannot recall how he described this individual's hair. I think it is improper cross examination to make that statement.

It assumes facts not in evidence.

The COURT. Overruled.

[67] * * * * *

Q. And that that individual was facing the manager and the employees located on the side directly across from the teller line?

Mr. MACINTYRE. Objection, your honor. It is confusing and compound.

This witness has testified as to the fact that he observed this person's face, that he then turned toward the bank manager, he saw him from the side and from the front.

I can't see that that question is anything but argumentative and confusing.

* * * * *

[69] By Mr. ALLIS:

Q. Does this refresh your recollection about what you told the FBI at the interview?

A. Yes, it does.

Q. Did you tell the FBI that you had noticed another——

Mr. MACINTYRE. Objection, your Honor. This is improper cross examination unless this counsel is trying to impeach this witness with testimony inconsistent with his testimony at trial.

There has been no foundation laid for this whatsoever. It is up to this jury to determine the credibility of this witness and his recollection of the events.

If he said something inconsistent from this witness stand with an interview with the FBI, then counsel, of course, has the right to point that out.

But these things which this witness is being badgered with and asked to read are not inconsistent with any testimony given in this trial.

The COURT. Let's simply ask him, Mr. Allis, now that his recollection is refreshed what he then did tell the FBI.

* * * * *

[77] Q. Do you recall on March 26, 1973 being interviewed by a Mr. John Bond?

A. I don't recall.

Q. Do you recall being interviewed by an investigator with the Federal Public Defender's Office?

A. Yes, I think I do.

[78] Q. You think you did, sir?

A. Yes.

Q. Do you recall stating to Mr. Bond what part of the man under their surveillance camera you saw?

A. No, I don't.

Q. Isn't it also a fact that——

Mr. MACINTYRE. Your Honor, I think the witness ought to have the opportunity to refresh his recollection from any document in the possession of the Federal Public Defender's Office, and I think government counsel ought to be furnished a copy of it in prosecuting this case.

The COURT. Mr. Allis, do you have any objection?

Mr. ALLIS. I don't have any objection to refreshing the witness' memory with my interview.

* * * * *

[89] By Mr. ALLIS:

Q. Do you recall ever telling anyone outside this courtroom that the only part of this man you saw was his back?

Mr. MACINTYRE. Objection, your Honor. It is an ambiguous question. Anyone, when or where?

The COURT. Overruled.

The WITNESS. I saw the side of him and his back.

By Mr. ALLIS:

Q. That was not the question.

The COURT. Just a moment. Let's reread the question.

Listen carefully to the question, Mr. VanGemeren.

[Whereupon the record was read as follows: "Q. Do you recall ever telling anyone outside this courtroom that the only part of this man you saw was his back? "]

The WITNESS. No, I do not recall.

[90] By Mr. ALLIS:

Q. Isn't it a fact that on March 26, 1973 you had an interview with Mr. John Bond of the Federal Public Defender's Office?

A. I believe that's true.

Q. And isn't it a fact that you told him the only thing you recalled seeing was the back of the holdup man?

Mr. MACINTYRE. Objection, your Honor; no foundation.

The COURT. Overruled.

You may answer.

The WITNESS. I do not recall.

By Mr. ALLIS:

Q. Do you recall anything you said to Mr. Bond?

Mr. MACINTYRE. Your Honor, that is an ambiguous question. I think the witness ought to be allowed the right to refresh his recollection if there is any written statement that he gave to Mr. Bond, and I think the government ought to be furnished a copy of it.

The COURT. I think we resolved that yesterday, did we not? Mr. Allis had agreed to allow the witness to examine whatever statement he made.

Has that been done, Mr. Ailis?

Mr. ALLIS. No, it has not, your Honor.

The COURT. All right.

[91] Mr. ALLIS. I would like to approach the bench on that matter.

Mr. MACINTYRE. I would like to ask the Court to order counsel to give me a chance to——

The COURT. You may approach the bench.

[The following proceedings were had at the bench, outside the hearing of the jury:]

The COURT. It is my recollection, Mr. Allis, that you had agreed to show the witness this particular statement so that we could proceed. Has that been done?

Mr. ALLIS. I had agreed to that, Your Honor, and after saying that yesterday, I talked it over with several other attorneys in our office.

It is our position that we do not have to do that because I am only trying to use this interview for impeachment purposes.

However, if your Honor wishes me to, I will state my position that I would rather not.

The COURT. I think it appropriate that you should do so, and then he can either agree that he said it or deny that he said it, whatever the allegedly impeaching statements are.

Mr. MACINTYRE. Your Honor, could the Court order him to furnish me a copy of it, too?

[92] Mr. ALLIS: Again, I object to that, your Honor, that it is improper.

The COURT. He is going to be able to look at it eventually on redirect, is he not? Is he not going to be entitled to look at the various statements that the witness either denies or admits to?

Before trial, I agree it would have been improper, and I wouldn't have allowed it, but now he has a right to go into it ultimately just as you do with the Jencks Act statements. I think it is proper that he should have a look as well as the witness.

Mr. ALLIS. I would just like to note my objection, your Honor.

The COURT. All right.

Mr. MACINTYRE. May I have a copy right now?

[The following proceedings were had in *open court* in the presence of the jury:]

Mr. ALLIS. Your Honor, may I have a moment to tear this, because it is amidst other interviews.

The COURT. Very well.

Mr. ALLIS. Thank you.

Mr. MACINTYRE. Your Honor, if there is any excising of statements, I think the Court ought to hear it.

The COURT. Are you representing, Mr. Allis, that there are interviews on the sheet of other witnesses or [93] potential witnesses?

Mr. ALLIS. I am, your Honor, and I would like your Honor to take a look at it to make sure, but I do not feel that it is my duty, and that it would be improper for me to show this to Mr. MacIntyre.

The COURT. Are you representing that you are presenting the entire statement of this witness to this witness?

Mr. ALLIS. Yes, I am, your Honor.

The COURT. All right. You may proceed.

Mr. MACINTYRE. Your Honor——

The COURT. If you wish to approach the bench, you may.

Mr. MACINTYRE. I would like to just—I don't feel like I ought to have to approach the bench. I would just like to hand this to the Clerk of the Court, and have it marked as the Court's exhibit, because it is really unintelligible to me.

I mean it is cut into pieces and there is no name on it or anything. I can't—there is a name of this witness——

The COURT. It will be marked for identification.

Mr. ALLIS. If there is a piece of scotch tape I will gladly scotch tape this under the other, and I believe that that may make it clearer to the United States attorney.

[94] Mr. MACINTYRE. If he presents it I would like it marked as the Court's exhibit.

The COURT. We will mark it as defendent's A for identification.

Mr. MACINTYRE. And I would like also the representation that counsel is in possession of no other written or recorded statement of any interview of this witness.

The COURT. We will take that up subsequently. Let me see the exhibit, and then you can mark it.

[Whereupon the document hereinabove referred to was handed to the Court.]

[Whereupon the Court looks at the document hereinabove referred to.]

The COURT. Very well. Let's proceed.

[Said document was marked Defendant's Exhibit A for identification.]

The COURT. Mr. Allis, do you wish this placed before the witness?

Mr. ALLIS. Yes.

The COURT. Would you place it before the witness, please, Mr. Clerk.

[Said document placed before the witness.]

The COURT. Okay.

* * * * *

[98] By Mr. ALLIS:

Q. Does reading this interview with Mr. Bond refresh your recollection as to whether you told him that the only thing you recalled seeing was the back of the man under their surveillance camera?

Mr. MACINTYRE. Objection, your Honor. It misquotes the evidence and what this witness told Mr. Bond on that occasion.

The COURT. All right. State your objection.

Mr. MACINTYRE. I object to the question as being—There is no foundation for it, first of all. Second of all—Well, that is the main objection. There is no foundation to that question whatsoever.

It is what this witness testifies to in this courtroom that is important, unless he has been impeached by some prior interview, and there is no foundation for any impeachment.

The COURT. Just a moment. The objection is overruled.

[99] Do you have the question in mind, sir, or do you wish it reread?

The WITNESS. Reread, please.

The COURT. Reread the question, please.

[Whereupon the record was read as follows: "Q. Does reading this interview with Mr. Bond refresh your recollection as to whether you told him that the only thing you recalled seeing was the back of the man under their surveillance camera?"]

The WITNESS. Yes, it does.

By Mr. ALLIS:

Q. Did in fact you tell Mr. Bond that the only thing you recalled seeing was the back of the holdup man under the surveillance camera?

A. I don't recall that.

Q. What does the statement refresh your recollection as to?

A. My statement says that I only saw the back of the man.

Q. Does this refresh your recollection as to what you saw on the day of the bank robbery?

A. Yes.

[100] Q. Did in fact you see only the back of the bank robber?

A. No.

Q. Does this refresh your recollection as to what you told Mr. Bond on the day of his interview?

Mr. MACINTYRE. Objection, your Honor. That question has been asked and answered now three times.

The COURT. Yes. Sustained.

* * * * *

[119] [The following proceedings were had at the bench, outside the hearing of the jury:]

* * * * *

Mr. ALLIS. At this time, your Honor, I move in the alternative for a mistrial because of the continual testimony of the United States Attorney. He has repeated a number of times to the jury that there were two positive ID's by this witness or, in the alternative, that your Honor admonish him to keep his objections simple and clear, and not to testify.

* * * * *

[120] The COURT. All right. From now on if there is going to be any objection by other side you will simply state legal ground for the objection, and the Court will either rule or, if you wish to argue the matter, you may approach the bench.

RECROSS EXAMINATION OF PETER VAN GEMEREN

[133] By Mr. ALLIS:

Q. When you spoke with Mr. MacIntyre in his office this morning was there any mention of the name John Bond?

A. No.

Q. Was there any mention of what you could answer in response to my questions?

A. No.

Q. What did you talk about at that interview?

Mr. MACINTYRE. Your Honor, I think it is an unintelligible question. I think the witness testified he has only been interviewed twice, once by me yesterday morning.

He testified earlier in trial that he did not talk with me about the facts of the case this morning, and I think the question is confusing.

Mr. ALLIS. Objection, your Honor. I request that the testimony of Mr. MacIntyre be stricken and my objections previously made at the bench I request again.

[134] The COURT. The motion is denied.

* * * * *

DIRECT EXAMINATION OF GARY HOFFMAN

* * * * *

My Mr. MACINTYRE:

[323] * * * * *

Q. You may resume the stand. Where was the fourth individual, did you say? Where would the fourth individual be?

A. Well, I'm confused on the numbers.

Q. You pointed to the location of three individuals as shown in the surveillance composite. Where would the fourth individual be?

A. The fourth, again, to the diagram?

Q. Yes.

A. The fourth individual was positioned approximately here (indicating), to the——

Q. You are pointing to an area underneath the [324] surveillance camera. Is that the front door of the bank?

A. That is correct.

Q. All right. You may have a seat.

* * * * *

[325] Do you see the individual in this courtroom that you saw at the front of the bank?

A. Yes, sir, I do.

Q. Would you point him out?

A. The gentleman here in the blue suit.

Mr. MACINTYRE. May the record reflect the witness has identified the defendant Robert Nobles.

The COURT. Yes.

[327] * * * * *

Q. Looking at approximately the man you have identified as defendant Robert Nobles, how far approximately were you from him in the bank?

A. I would say approximately, judging in terms of distance, perhaps from me to you.

Mr. MACINTYRE. Let the record reflect that is approximately——

The COURT. Just a moment. I can give you an exact measurement. We have had it measured previously. Twenty-four feet.

Mr. MACINTYRE. All right.

* * * * *

[328] Q. First of all, how long would you estimate that the robbers were in the bank?

A. I would guess that it would be somewhere in the vicinity of five to eight minutes, something of that nature.

Q. During that period of time for what period of time was your attention focused on the man you have identified as Robert Nobles? Approximately.

A. Perhaps two, three minutes, possibly. It's hard to really put it——

Q. About a third of the time the robbery was being committed?

A. Yes.

Mr. ALLIS. Objection, your Honor; leading.

The COURT. Sustained.

By Mr. MACINTYRE:

Q. The man you have identified as defendant Robert Nobles, what if anything did he say?

A. There was one point in the robbery where a female attempted to enter the bank and was grabbed by the defendant, and an attempt was made to physically force her into the bank.

At that time I heard the defendant indicate something to the effect of, "Come on, get in here. Get in here."

* * * * *

[329] Q. You were interviewed by the FBI on March 28, 1973, were you not?

* * * * *

Q. At that interview you were shown a photo [330] spread, were you not?

A. Yes, sir, I was.

* * * * *

CROSS EXAMINATION OF GARY HOFFMAN

* * * * *

By Mr. ALLIS:

[351] * * * * *

Q. What position was the man under the surveillance camera in, what body position did he take during the time that you saw him under the surveillance camera?

A. He would have been generally facing toward the teller area, and then occasionally shifting to his right, in terms of body position.

Q. Could you draw with an arrow the position [352] where he was facing?

A. Well——

Mr. MACINTYRE. On what occasion, your Honor? I think the question is confusing. He said he faced both ways, toward the witness and toward the teller's area.

The COURT. All right. Let's clarify the question, please.

Mr. ALLIS. I don't believe that he did testify that way, your Honor. Again, I object to Mr. MacIntyre testifying.

* * * * *

Q. How much of the time, if you can recall, was he facing the teller area, the first line that you marked?

A. I really can't say. At that time I was really not cognizant of actual time spent. I do know that [353] on many occasions when I looked that way he was observing the other gentlemen in the back of the bank that was behind the tellers' cages.

Q. What was the total time that you shifted your glances to him and saw him?

A. I would say probably about one-third of the time that I was viewing the holdup.

Q. Do you recall him facing the other side of the bank away from the tellers' area at any time?

A. I can't recall that he did, no.

* * * * *

[385] A. I had another occasion to meet with him at the lineup, which was held at the County jail.

Q. When did that occur?

A. I believe it was two days after that, on a Thursday evening, to make it, I guess, the 30th of March.

[402] * * * * *

Q. Isn't it a fact that you told Mr. John Bond of the Federal Public Defender's office that you were not 100 percent sure that that was the man?

Mr. MACINTYRE. Objection, your Honor. There is no foundation for that question as to the fact that he ever talked to John Bond, when he talked to him, and the circumstances of that interview. Just throwing out a bald statement like that is——

The COURT. Sustained.

By Mr. ALLIS:

Q. Do you recall the conversation with Mr. John Bond on April 6, 1973?

A. Was this in a telephone conversation?

Q. Yes, it was.

A. Yes, I do.

Q. During that conversation did he request that he meet with you for an interview?

A. Yes, he did.

Q. Would it be a fair statement to say that [403] you would be on the road and that you agreed to be interviewed by telephone?

A. Yes.

Q. Isn't it a fact, that you told Mr. Bond during that interview that you could not be 100 percent sure that the man in the bank under the surveillance camera was the same man in the lineup?

[404] * * * * *

The WITNESS. I would have to say yes, that is basically the text of what I told Mr. Bond.

By Mr. ALLIS:

Q. And isn't it a fact that you told Mr. Bond that to you all the blacks appear to be alike?

A. I don't believe I indicated that to him.

Q. You do not recall stating that to Mr. Bond?

A. No, I do not.

Q. That all blacks look alike?

A. No, I do not, sir.

Mr. ALLIS. No further questions. I would like to approach the bench, your Honor.

The COURT. You may approach the bench.

[405] [The following proceedings were had at the bench outside the hearing of the jury:]

Mr. MACINTYRE. Your Honor, first I would request the Public Defender furnish me a copy of any interview, notes or recorded statements of Mr. Bond—in regard to a phone call. I notice he has a copy, and I would like to have a copy of that at this time before I am able to proceed with redirect examination of this witness.

The COURT. Mr. Allis?

Mr. ALLIS. I object to that, your Honor. It is not called for under the law.

The COURT. It seems only fair, if the government gives you copies of all the statements made. I think that the government is entitled, in view of the attempt at least of impeachment to see a copy of the statement that this witness made.

Do you have any points and authorities that would indicate that the government is not entitled to at least view the statement of this witness?

Mr. ALLIS. I don't have right here. I am sure that I can find some within a half-hour.

The COURT. All right. I will give you time to submit points and authorities. Otherwise, please give Mr. MacIntyre a copy.

* * * * *

[407] Mr. ALLIS. Yes, your Honor. I would like to move for a mistrial. Mr. MacIntyre's testimony to the jury has prejudiced my client to such an extent that I do not believe [408] the jury can reach a fair decision based on the testimony given in this trial.

[409] * * * * *

The COURT. I am going to deny the motion for a mistrial, but I am going to instruct you, Mr. MacIntyre, in the future if, for example, you feel, taking a specific example given, that investigative procedures were in some way improper—you may ask to approach the bench and you may state it before the bench. Do not in the future make such statements before the jury.

* * * * *

[414] The COURT. Let's assume for the sake of discussion that a witness had stated at some relevant time that insofar as he, the witness, was concerned, all people of the black race looked similar.

Mr. MACINTYRE. All right.

The COURT. Would that not be quite relevant in determining his ability to make specific identification among four people of the black race, in that he had previously stated that they all looked similar or equal, or the same?

Mr. MACINTYRE. If he had, yes.

The COURT. Of course, that is not for the Court to determine. That is for the jury to determine, whether or not he had made such a statement.

It can't be excluded from the jury's consideration based only on the witness's statement that he never said it.

Mr. MacIntyre. You are correct.

The Court. Mr. Allis has a right to introduce what he contends are impeaching statements, if they are generally impeaching, and it is up to the jury to determine the credibility of the respective witnesses, this witness, Mr. Hoffman, and the witness Mr. Bond.

* * * * *

[416] Q. Directing your attention to the time of the robbery in the bank, which was the robber of the four which you could see most clearly?

A. I would have to say would be the one in the front underneath the cameras.

Q. Isn't it a fact that you told John Bond during the interview with him that the man who was standing at the teller's cage directly across from you was the one you could see more clearly and would be able to identify?

[417] * * * * *

"Q. Isn't it a fact that you told John Bond during the interview with him that the man who was standing at the teller's cage directly across from you was the one you could see more clearly and would be able to identify?"]

The Witness. Yes, I believe I said that.

* * * * *

DIRECT EXAMINATION OF JAMES R. WILKINS

[422] By Mr. MacIntyre:

Q. Mr. Wilkins, by whom are you employed?

A. By the Federal Bureau of Investigation.

[423] * * * * *

Q. When, where and under what circumstances did that arrest take place?

A. The arrest occurred on March 15, 1973 at approximately 10:30 P.M. in the evening, at a bottomless-topless bar located at 11151 South Vermont Street in the City of Los Angeles.

Mr. Allis. Your Honor, at this time I request that I be permitted to approach the bench.

* * * * *

Mr. Allis. Your Honor, I move that the testimony concerning bottomless-topless bars be stricken as unduly prejudicial.

* * * * *

[424] Mr. Allis. Your Honor, if I my, it is my position that when a man is arrested and then he is thrown up against a wall and patted down, and then asked what his name is, and [425] he denies it, that before that denial can be used in court against him it must be shown that he was given his Miranda rights.

And, in addition, your Honor, I move that no testimony be——

The Court. You have given a different fact situation than the offer of proof of Mr. MacIntyre. I understand that this officer went in and asked him what his name was——

Mr. MacIntyre. Right.

The Court.—before any arrest occurred. Now, I may have it wrong.

Mr. MacIntyre. That is correct. He told him to come outside. Robert Nobles went outside and said he was not Robert Nobles.

* * * * *

[431] The Court. Ladies and gentlemen, you are admonished that the scene or the locale of this particular episode is of no materiality to this particular case, and you are admonished to ignore it.

* * * * *

A. Myself and another agent, Special Agent Wayne L. Wickizer, W-i-c-k-i-z-e-r, went into the establishment and saw Mr. Nobles sitting at the end of the bar, in a crowd of other people.

Mr. Wickizer and myself approach Mr. Nobles, Mr. Wickizer going to one side of him, and I went to the other side.

I made the statement, "FBI, Robert Nobles, you are under arrest."

Q. What occurred then?

A. At that time I believe he had a glass, a drink in his hand. He looked at me, made no effort to move whatsoever, and at that time Special Agent Wickizer and myself removed Mr. Nobles from the stool and proceeded to take him [432] outside of the establishment.

* * * * *

[433] By Mr. MacIntyre:

Q. After you and Special Agent Wickizer removed the defendant Robert Nobles from the bar, what occurred then?

A. He was immediately taken outside of the establishment and placed up against a wall where Special Agent Wickizer and Special Agent Jerry D. Price, P-r-i-c-e, proceeded to frisk him for any weapons which he might have on him.

At that time he was handcuffed and taken a short distance away from the opening of the establishment.

Q. What if anything did he say in regard to his identity?

A. When I asked him if he were Robert Nobles he denied—He said, "I'm not Nobles."

Q. Then what occurred?

[434] A. I told him that I knew he was Robert Nobles and that he might as well admit his identity. He again denied his identity.

Q. Then what occurred?

A. At this time, through my prior investigation, I knew that Robert Nobles had several tattoos on his forearms.

At this time with the assistance of Special Agent Wickizer we proceeded to roll up the sleeves on his suit, and at this time I observed on his arms the particular tattoos that I knew the subject to have as being Robert Nobles.

When confronted with this, he said, "Okay."

* * * * *

ARGUMENT OUTSIDE THE PRESENCE OF THE JURY REGARDING REQUEST FOR DEFENSE INVESTIGATOR'S MEMORANDUM

[465] The COURT. Gentlemen, if we may, let's shorten the [466] issue. The issue, as the Court views it—First of all, the Court is not going to order disclosure of this memorandum at this time. At the present time there has been no impeachment and will be no impeachment until the investigator takes the stand and testifies as to the allegedly impeaching statements.

Therefore, the issue will not arise until the investigator does take the stand. The issue thereafter will be whether or not for utilization for impeachment purposes the government should be entitled to examine the memorandum made by the investigator, presumptively concurrently with his inquiry of the allegedly impeached witness for purposes of furthering the government's cross examination.

That is how I view the issue. If counsel view it differently, of course, let's discuss the issue before we discuss the resolution of it.

Mr. MACINTYRE. I think that is the issue, your Honor.

The COURT. Mr. Allis, do you view it in any different light than that?

Mr. ALLIS. Your Honor, it is agreeable with me to confine it to that issue. However, the Court did order me previously to produce a statement of the investigator involving an interview by him with a witness, and I assumed that your Honor was talking about the same thing in this situation.

I would like to note my objection to that again.

[467] The COURT. Upon reflection, there has not been any impeachment of this witness, as yet, I am sure you agree, until the actual impeaching witness testifies as to the impeaching statement.

Simply asking him, "Didn't you tell—" so and so something or other, unless he admits it, of course, then there has been no impeachment. Do you agree with that?

Mr. ALLIS. I certainly do.

The COURT. All right. So the Court is not going to order the disclosure of any investigative reports until the investigator has taken the stand, testified in full and related, if he does, the allegedly impeaching statement.

Then the issue will arise as to whether or not the government, in pursuing cross examination, may be afforded an opportunity to examine the prior memorandum made at the time when presumptively the facts were fresher in the investigator's mind.

Now, do you wish to be heard in that regard, Mr. Allis?

Mr. ALLIS. Your Honor, I think I will rest on this memorandum of points and authorities. First, basically, Rule 16(c) does not authorize the discovery of any defense documents.

The COURT. I don't think 16(c) is applicable. We are really talking about post-testimony production, are we not, [468] 16(c) having to do with pretrial discovery.

Mr. ALLIS. As I understand it, your Honor, then Rule 16(c) applies, does apply, on discovery.

There is an exception in 16(c) to the government concerning witnesses, the government providing statements of witnesses. Now, the Jencks Act covers that and provides only for the government to give statements of witnesses after they have been examined on direct.

That act provides for no reciprocal discovery by the defense.

Furthermore, your Honor, as in the last two pages of the memorandum, we feel that our position is that the Fifth Amendment rights of the defendant would be violated because I would be forced to disclose possible material detrimental to him that I have gotten through use of my investigative sources.

Finally, the defendant's Sixth Amendment rights would be affected because his counsel's performance of thorough investigation would be hindered if that investigation had to be conducted in such a manner as to avoid any writing down of material which is detrimental to the defendant.

Lastly, your Honor, Hikeman versus Taylor, which was a civil case, prohibited the discovery of the work of statements of witnesses for one's side on the grounds that they were the work product of the attorney.

[469] We also feel that the investigative material in this case is the work product of the attorney.

The COURT. Isn't that relative to pretrial discovery, Hikeman versus Taylor?

Mr. ALLIS. It did have to do with pretrial discovery, your Honor, but the principle remains the same, because it was based on a constitutional principle, and that constitutional principle in our view is not waived with regard to what time at trial it is put forward.

The COURT. Thank you. Mr. MacIntyre? Before you begin your argument, Mr. MacIntyre, will you recite for the record what you wish this memorandum for and what portions of it you wish.

Mr. MACINTYRE. What I wish the memorandum for?

The COURT. The investigator's memorandum or statement.

Mr. MACINTYRE. All right. I would desire to be able to look at the memorandum so that I can effectively cross-examine a witness who, possibly, could have given or made any inaccurate notes or falsified testimony given from a government witness.

I think in order to effectively do that and to effectively prosecute and fulfill my duties as an Assistant United States Attorney I should be given the right to see any memorandum in the possession of this investigator which might be conrtrary to his testimony on the witness stand.

[470] I will submit the matter to the Court.

The COURT. All right. The Court is going to rule as follows: first of all, the government may not have the memorandum

until the witness has taken the stand and has indicated the particular impeaching testimony which was the last part of Mr. Hoffman's testimony relative to his inability to distinguish between people of the black race.

And if he does make such a statement, if he and Mr. Bond make such a statement, then I believe the government is entitled to an examination of the memorandum—not before that time—but after that time, after he has completed his entire testimony.

The COURT. The issue, of course, may not arise. It is dependent upon whether or not Mr. Bond is called to testify, but that is the Court's view at this time.

Mr. MACINTYRE. Thank you.

Mr. ALLIS. Your Honor, one more comment, and that is that——

The COURT. I will say this to assist you, Mr. Allis, while I think about it. I am sure there are no statements by any of the defendants contained in this particular memorandum, and my order is going only to this particular memorandum. I am not generalizing on any other memorandum or memoranda you may have.

[471] It goes only to this particular memorandum involving the particular witness Hoffman. If you represent to me that there are matters contained therein, such as recitals by the defendants or your defendant, of course, I would view it imperative that you have the opportunity to excise that, perhaps after an in-camera session with the Court, or something of that nature.

I am specifically concerned only with the Hoffman statement of Mr. Bond. Now, I am sorry I interrupted you.

Mr. ALLIS. I would like to reserve anything further until such time at which the citation may arise, if I may.

The COURT. All right.

* * * * *

ARGUMENT OUTSIDE THE PRESENCE OF THE JURY REGARDING GOVERNMENT MOTION TO EXCLUDE TESTIMONY OF DR. ROBERT BUCKHOUT

[472] Los Angeles, California, Tuesday, April 17, 1973, 10:15 a.m.

* * * * *

[475] Dr. Buckhout is a recognized expert in the area and can testify to the generally accepted theory that identification is a decision-making process which involves both factors having to do with the physical situation and factors having to do with the psychological input on the particular observer.

As far as interfering with the jury's function, your Honor, Dr. Buckhout will testify on the stand, if permitted, that he has no intentions of doing this, that it is up to the jury.

* * * * *

[476] Mr. ALLIS. That is correct, your Honor. And he will also testify that there are approximately 16 factors involved in eyewitness identification. He is quite prepared to testify that many of them are not involved in the identifications here, but some which I have specifically mentioned in the offer of proof are involved.

[477] * * * * *

He will describe the experiments that he has done to illustrate that these factors do indeed play a part in eyewitness identification.

* * * * *

Mr. ALLIS. Various experiments have been done with each of these 16 factors. Some of these 16 factors are present here.

For example, stress is one of those 16 factors. Because of the presence of stress in the particular incident involved here, this is going to have an effect on the ability to perceive of the observer in this case, and it is going to affect it so that it is going to be less reliable than it would have been had this factor of stress not been present.

* * * * *

[481] The COURT. It is the Court's view, and the Court has given some considerable thought to this, and has read every case that the Court can find on the subject—and they are relatively sparse. In addition, the Court has read on the recognized experts in this field, Wigmore, et cetera.

It is the Court's view that it does not take an expert to tell a jury that a person, when under stress can make a mistake. I think that is clearly a matter of [482] argument. I think it would be an invasion of the province of the jury if we should allow this type of testimony in these cases.

The ultimate extension, of course, would be that a psychologist would testify in every case where there was some type of stress or excitement, every personal injury case where automobiles came together and testimony resulted thereafter, the Court would have to allow, then, the additional testimony of psychologists.

Certainly, the Court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate the undue consumption of time.

In this case, I can only see that there would be excessive collateral considerations, we would be immersed in a welter of collateral matters.

* * * * *

The Court is going to hold that it is unreasonable to request such testimony, that it is not necessary in this case, that the offer of proof is inadequate, and that such testimony would not be of assistance to the trier of facts, [483] and that they are uniquely, as jurors, able to pool their common experience and to resolve these very specific issues which Dr. Buckhout would seek to testify to.

* * * * *

Considering the costs involved, the considerable collateral matters, in the Court's view it would probably take longer to have this type of testimony and rebuttal testimony than it would take to try the entire case. Even though it might have some minimal probative value, the collateral considerations are such that it should be excluded. That will be the order of the Court, gentlemen, that the testimony of Dr. Robert Buckhout will be excluded.]

* * * * *

ARGUMENT OUTSIDE THE PRESENCE OF THE JURY REGARDING TESTIMONY OF JOHN R. BOND, DEFENSE INVESTIGATOR

[518] * * * * *

Mr. MACINTYRE. Excuse me, your Honor. On Thursday afternoon at 5:00 o'clock the Court ruled that if Mr. Bond took the stand and testified in this trial that defense counsel [519] and Mr. Allis must furnish the government counsel a copy of any investigative report that Mr. Bond has made.

I would like that report in my possession if he is going to take the stand.

The COURT. I think my ruling was that at the completion of his testimony and as to the relevant portions of his testimony that defense counsel would have to submit a copy of that report. And he hasn't completed his testimony. I don't really know what he is going to examine on.

Mr. MACINTYRE. All right. I just don't want to delay the trial. That is all.

The COURT. You are prepared to submit the relevant portions of the report itself, Mr. Allis, at the completion of his testimony?

Mr. ALLIS. No, I am not.

Mr. MACINTYRE. Then I want the——

The COURT. Just a moment.

Mr. MACINTYRE. Your Honor, I don't want to——

The COURT. Wait a minute. Give me an offer of proof, then, as to what Mr. Bond is going to testify to.

Mr. ALLIS. He is going to testify to some photographs that he took at the bank, and he is going to testify as to—He is going to impeach Mr. Van Gemeren, and he is going to impeach two statements of Mr. Hoffman.

The COURT. All right. Are you prepared to turn over [520] to the government at the completion of the testimony whatever alleged statements were made by Mr. Van Gemeren and Mr. Hoffman to Mr. Bond as contained in his report?

Mr. ALLIS. No, I am not.

Mr. MACINTYRE. Then I move to exclude his testimony.

The COURT. All right. The Court is going to exclude his testimony in those areas, if you are not willing to do so.

Mr. ALLIS. I would like to talk to an associate, but my position is the stated one.

Mr. MACINTYRE. Your Honor, I don't want him to play any games with us now. If Mr. Bond is going to testify I want his entire report submitted to the Court for in-camera inspection and for the Court to allow me to see what reports there are.

I don't want anything as to Mr. Bond testifying and then after he has testified Mr. Allis saying, "Well, we are not going to give you his report, Mr. MacIntyre."

This Court has made a ruling, and I would like it complied with.

The COURT. Mr. Allis is an officer of the court, and Mr. Bond is allowed to testify it would be necessary that those portions of Mr. Bond's investigative report which contain the statements of the impeached witness will have to be turned over to the prosecution; nothing else in that report.

[521] If Mr. Allis indicates to me that he refuses to do that, then I am not going to allow the particular witness to testify in that area.

Now, it is entirely up to Mr. Allis as to what portion, if any, of Mr. Bond's testimony he wishes to elicit.

Mr. ALLIS. All right. At this time, your Honor, I would like to submit an offer of proof from Mr. Bond to make——

The COURT. I think you previously have done so. He is going to testify to some photographs that he took and he is going to testify as to statements made to him, which you view as impeaching by two of the witnesses in this matter.

Mr. ALLIS. Yes, your Honor. And if it is permissible with your Honor to make sure I have not left out anything, I would like to get my statement of what he is going to prove so I can review that and tell your Honor if he is going to testify to anything else.

The COURT. If he testifies in any way about impeaching statements made by either of the two witnesses, then it is the Court's view that the government is entitled to look at his report and only those portions of that report which contain the alleged statements, the alleged impeaching statements of the witnesses.

I don't see any necessity—There isn't an objection as to the relevance, Counsel is not objecting to that.

* * * * *

[522] Mr. ALLIS. First of all, there are two reports in my possession or in Mr. Bond's possession. The reports are in the possession of the defendant, and on behalf of them I put forward his Fifth Amendment right to be free of self-incrimination for not turning over any reports.

The COURT. Just a moment. Let's not go past that. In what way is he going to be incriminated by his statement of a precipient witness which is to be utilized for impeachment purposes?

[523] Mr. ALLIS. Because this report—your Honor, I understand, has taken the position, as a matter of principle, that this report may contain items which are favorable to the government's case,

The COURT. I am not asking you to submit the entire report. I am asking only that that portion of the report which contains this statement and the statement only of the witnesses to be impeached be exhibited, and after the testimony to the government, it is simply to determine the credibility of this witness's ability to recall.

If he has something different in his statement from what he testifies to, I think the government is entitled to cross-examine with that knowledge.

Mr. ALLIS. Just so that I can be clear, your Honor, is your Honor saying that I should turn over the statement in the report after my own cross examination or that I should turn over the whole report to you?

The COURT. No. I don't know how I can make it any clearer. You are not obligated to turn over the whole report. I don't think I have ever said that at any time during these proceedings.

It would be the Court's view that you are obligated to turn over and you are going to have to, if necessary, and outside the presence of the jury, cut out the relevant portions containing the statements of the two [524] witnesses, Hoffman and the other fellow. Those are the ones you are speaking of to impeach, and nothing else.

Mr. ALLIS, As far as Van Gemeren's statement, I have already shown Mr. MacIntyre and Van Gemeren the complete statement.

* * * * *

The COURT. Just a moment.

Has Mr. Allis shown you Mr. Bond's investigative report or at least the portion that contains the statement of Van Gemeren?

Mr. MACINTYRE. No.

Mr. ALLIS. I showed both the witness and Mr. MacIntyre in open court the complete statement of Mr. Van Gemeren.

Mr. MACINTYRE. I have had one glance at it.

The COURT. Let's put it this way. Mr. MacIntyre is apparently saying he hasn't seen it. All I am saying is if this witness is going to testify and recite a statement made by Mr. Van

Gemeren or Mr. Hoffman, then the government is entitled to look at that portion and that portion only of the investigative report of Mr. Bond which contains those statements.

[525] Now, are you prepared to conform to the Court's order, Mr. Allis, in that regard?

Mr. ALLIS. Your Honor, I have been previously ordered by Mr. — At this time, your Honor, if it is agreeable with your Honor, I would like to speak to an associate about this.

* * * * *

[526] The COURT. I can, if it would expedite this, examine this report in camera and make a determination. I don't think it is necessary to do so.

We have had the statement of this witness. If you want to furnish it to me prior to his testimony, I could read it while he is testifying, and we can get the matter moving along. Is that satisfactory with you, Mr. Allis?

Mr. ALLIS. My position at this time, your Honor, Rule 16 is that the other discovery consents in the Federal Court, that the Fourth, Fifth and Ninth Amendments protect the defendant in whose possession the reports are from turning them over for any reason.

The COURT. We are not talking about pretrial discovery. This is post testimony discovery. It has been carefully considered by the Court, and I am narrowing my ruling to the very specific area.

If you are not willing to conform to the Court's ruling, Mr. Allis, please so state and the Court will then instruct you not to inquire in the area of these allegedly [527] impeaching statements.

Mr. ALLIS. All right. I am not willing to conform, your Honor.

The COURT. You may proceed with your direct examination in other areas, then.

* * * * *

Mr. ALLIS. If it is permissible with your Honor, I would like to file at this time an offer of proof for testimony of John Bond and opposition to the order compelling that testimony to——

The COURT. Let me see your offer of proof.

[Whereupon Mr. Allis hands a document to the Court.]

[528] The COURT. All right. The Court will accept for filing the offer of proof for testimony of John Bond.

Apparently, then, you are offering the testimony of John Bond only to impeach the one witness Hoffman, I am gathering, by this offer of proof.

Mr. ALLIS. Your Honor, the reason that that offer of proof is made is because I am—Or, in addition, I want to impeach the testimony of Van Gemeren. Now, that is not included in that one, because I have already shown the whole statement——

The COURT. If you want an appellate court to be able to review what you are trying to do, you had better state an offer of proof as to what he is going to do so far as the impeachment of Van Gemeren.

Mr. ALLIS. All right. My offer of proof is that John Bond would testify that Van Gemeren told him that as far as the man at the surveillance camera is concerned, he only saw the back of that man.

The COURT. All right. The Court will also accept the Opposition to Order Compelling Defendant to Provide Government with Defense Memorandum of Witness Interview.

* * * * *

[543] Mr. ALLIS. Your Honor, as an amendment I would like to add this to the offer of proof of the testimony of John Bond, because I see that it was left out of the typed copy. Instead of being in the typed copy, Number B, it should be that he told—May I get my folder to make it absolutely correct?

The COURT. Yes.

Mr. ALLIS. It should be that he—as he recalls, the man who was standing at the teller's cage directly across from him, was the one whom he could see more clearly and would be able to identify. This is what Mr. Bond would testify that Mr. Hoffman told him.

The COURT. You are reading from what? For the record, is that Mr. Bond's report that you are reading from?

Mr. ALLIS. Yes.

Mr. MACINTYRE. Yes.

The COURT. All right.

[544] Mr. MACINTYRE. And I want a copy of the report.

Mr. ALLIS. Your Honor, I would also like to, for the record, make an objection to the procedure. I feel that I should be permitted to ask Mr. Bond the question, and then after he has answered, if there is any motion to strike that, that is when the objection of Mr. MacIntyre should be handled.

I object to being precluded from asking the question of Mr. Bond.

The COURT. I am not precluding you from asking the question. You are only precluded from asking the question by indicating in advance that you are going to refuse to comply with the Court's direction. I see no distinction between not allowing the witness to testify at this time or being required to strike the testimony at a subsequent date.

As a matter of fact, it would appear to me to be much more prejudicial to your client to have to strike this testimony than to have it not introduced. Certainly, you couldn't argue it because it is stricken.

* * * * *

The COURT. For the record, your offer of proof, does it include the fact that Mr. Bond did in this particular case, with these two witnesses, prepare notes during the time he [545] made his interview with these witnesses and then subsequently reduced them to a written report; is that correct, Mr. Allis?

Mr. ALLIS. That is correct. It is not in the offer of proof but that is what he did.

The COURT. And that, of course, is what we have been talking about when we were talking about a portion of the report being turned over to the government after the completion of Mr. Bond's testimony, I assume.

Mr. MACINTYRE. That is right. And he has refused to comply with it.

Mr. ALLIS. As an officer of the court, when your Honor asked me this morning what my intention was, I felt duty bound to tell your Honor what my intention was with regard to Mr. Bond's statement. I still object to not—if your Honor, given that intention, which I feel duty bound to tell your Honor, because your Honor has asked me what my intention is, if your Honor wants me—I don't know how to phrase this.

I felt duty bound to tell you what I was going to do. At the same time, I do object to not being able to ask, to not being permitted to ask him the question, because I believe that is a proper procedure.

The COURT. I have already explained to you my response to that. I would be required to strike the testimony. In the eyes of the law stricken testimony cannot be considered by the jury.

cannot be utilized by them in reaching their [546] determination.

I see absolutely no difference between your asking the question and then, for example, the court prohibiting an answer, or your asking the question, an answer being given, and your failing to comply with the Court's order, in which case the testimony will be stricken.

Mr. ALLIS. Do I understand your Honor is ordering me not to ask the question?

The COURT. No, I am not ordering you not to ask the question. I am allowing you to ask the question so long as you comply with the Court's direction that at the conclusion of this witness's testimony you will turn over that small portion of the report which relates to the two statements.

I have also offered the Court's services to examine this report in camera and to indicate what portions of the report should be excised for deliverance to the government. You have refused that.

Therefore, I have prohibited you from asking the questions in the area concerned.

* * * * *

CROSS EXAMINATION OF SUSAN ARLENE MATHIS

[567] By Mr. MACINTYRE:

Q. How old are you, Miss Mathis?

A. Nineteen.

Q. Whom were you working for on February 6th?

A. Theodore Bell.

Q. And that was as a nude dancer, was it not?

A. Yes, it was.

Mr. ALLIS. Objection, your Honor.

Mr. MACINTYRE. Pardon me.

Q. Were you a nude dancer on February 6th?

Mr. ALLIS. Objection, your Honor.

The COURT. Do you wish to approach the bench, Mr. Allis?

Mr. ALLIS. No, your Honor.

The COURT. The objection is overruled.

[568] By Mr. MACINTYRE:

Q. Were you dancing as a nude dancer on February 6th?

A. Yes.

* * * * *

CLOSING ARGUMENT FOR THE GOVERNMENT

By Mr. MACINTYRE:

[674] * * * * *

bank. It is awful easy—photographs can be confusing, as most of you know, in dealing with them, in taking pictures of your families, or when traveling. You can take a photograph to show about anything you want to.

What really happened, I think what really let the cat out of the bag in this case is that Mr. Bond went to this bank about 9:00 o'clock in the morning when the shadows were down and there was no lighting, and he stood right underneath the doorway where Mr. Nobles was standing, and he had a picture of him taken.

This is picture Number 3. And, of course, you can't even make out what race the person is or anything in this picture. And he wants you ladies and gentlemen to believe that at about ten minutes to nine or ten after nine [675] this is the way Mr. Hoffman got his look at Mr. Nobles.

Mr. ALLIS. Objection, your Honor. There is no testimony and no intent to show anything of the kind.

Mr. MACINTYRE. I will leave that to you to decide whether or not there is, ladies and gentlemen.

The COURT. Counsel can argue whatever inferences they feel are reasonable under the circumstances.

Mr. MACINTYRE. You take these pictures that Mr. Bond is trying to make you believe of what the view looked like, and you compare with the lighting and the surveillance pictures, and I will let you be the judges of who is trying to pull the wool over your eyes.

[676] * * * * *

lobby. The interesting thing about Mr. Hoffman's testimony

* * * * *

He said about one-third of his time was focused on the defendant Robert Nobles, right here, and on this person right here, directly across from him, who is now a fugitive. He said that the one thing that really drew his attention to the defendant Robert Nobles was that a woman came in the bank, and he grabbed this woman. Then she subsequently ran out of the

bank. This is an event which really stuck in his mind, as it would in any one of your minds.

* * * * *

his testimony, naturally, but at the lineup which he attended, which was on February 23rd, that is 16 days after the robbery, [677] at this lineup all of the defendants, the people in the lineup—there was only the defendant Robert Nobles in that particular lineup, all of the——

Mr. ALLIS. Objection, your Honor. There was no lineup in the month of February.

Mr. MACINTYRE. You will recall the date when you——

The COURT. Ladies and gentlemen——

Mr. ALLIS. I strongly object to that. The testimony was the lineup was two days after March 28th.

The COURT. Ladies and gentlemen, your recollection of when this particular lineup occurred will control in this matter.

* * * * *

[679] This is where Mr. Hoffman was standing. This is where the teller Peter Van Gemeren was standing, looking at it. So I submit to you that these photographs are distorted and they are trying to show you ladies and gentlemen something that didn't really occur at the time of the robbery.

In fact, they were taken at 9:00 o'clock in the morning instead of at 11:20, most of them.

[681] * * * * *

You can consider the fact that he denied his identity at the time of his arrest and was hiding out from the FBI also. Thank you.

Mr. ALLIS. Objection, your Honor. There is no testimony about hiding out from the FBI. I strongly object to that.

The COURT. All right. The jury's recollection, as previously indicated, will control in this matter.

* * * * *

REBUTTAL ARGUMENT FOR THE GOVERNMENT

By Mr. MACINTYRE:

[737] * * * * *

You know, ladies and gentlemen, Darrell MacIntyre didn't bring this particular indictment. This indictment was brought by the Grand Jury of the Central District of California, and

you will have a copy with you. Of course, I have a personal interest in this case, that interest being to see that justice is done, and to see that witnesses come in this courtroom and testify under oath as to the truth of what happened.

We can all sit here and jump on Mr. Hoffman, and we can jump on Mr. Van Gemeren all we want to, but we have to ask ourselves one question. What is a good identification witness? That is a difficult question. What is a good soldier? Audie Murphy was just a plain, common man, and yet in the World War he won the Medal of Honor. He didn't want to do what he had to do, but he did it. He probably was an outstanding soldier.

What did Gary Hoffman do in this case? Mr. [738] Hoffman is just a citizen, just a person like any one of you. He was in the bank, and you have the surveillance pictures with you. He looked at Robert Nobles, he came into this courtroom, under oath, in front of Almighty God, and he said, "That's the man that was standing underneath that camera." He has no motive to lie.

When I prepare these cases with the help of the FBI, I don't bring puppets into this courtroom. I don't have any control over their thinking. They are seeing and they are speaking. They testify under oath.

If that wasn't the man that he saw under that camera, he would have said it wasn't. It is just as simple. They are people trying to tell the truth.

If you want to believe that 19-year-old nude dancer who says that she was with Robert Nobles on that date, then you believe her. Then you believe her. She has an interest in this case. She has been sitting in this courtroom all week. Of course she has an interest.

She was shacking up with Robert Nobles at the time. That is as good an interest as there is.

Mr. Hoffman stood right here in this public lobby, and he saw Robert Nobles. I don't care how many investigators come in this courtroom that don't even have good enough eyesight that they can't even look at a photograph from 12 inches and tell you what time it is.

[739] Then he says, "I stood all over that bank, and this is what you can see." Well, my God, he can't even see 12 inches without his glasses, and he doesn't have his glasses on in these pictures.

Mr. ALLIS. Objection, your Honor. He never testified as to what he could or could not see.

The COURT. All right. Let's proceed, Mr. MacIntyre.

Mr. MACINTYRE. You know, ladies and gentlemen, when the shoes gets tight the foot starts to squirm, and we've got some squirming feet over here.

[740] * * * * *

We don't have to bring the wardrobe out of that apartment in here. There is no need to, and that is why we don't do it. We brought the witnesses in here. The uncontradicted testimony is that Robert Nobles was underneath that surveillance camera. The uncontradicted testimony.

* * * * *

You can look at this photo spread, which counsel has so neatly gone through, and ask yourself, what is a fair photo spread? I submit to you this photo spread [741] is very fair to the defendant Robert Nobles.

The FBI can't help it if when they put a picture in there it happens to say, "Pasadena, California Police Department," or some other area. They don't go out and just arrest people to put them in the photo spreads. They try to pick out an individual who has similar facial characteristics, because they are just as interested as any one of you or I am in making sure that the right man is convicted. And that is what they did in this case.

[742] * * * * *

What difference does it make? Mr. Hoffman got a panoramic view of Robert Nobles right there underneath that camera, and I submit to you he would not, under oath, say that that is the man if he wasn't sure in his mind that it was. No question about it.

* * * * *

[744] And you know when they really jump on me, they have really come down the ladder. When you can't talk about the facts and you can't talk about the law, and you have got to jump on some young FBI agent, and that doesn't work, when you have got to go after the prosecutor, you are really hurting in this case, really hurting, and you better believe Mr. Brown, Mr. Swain and Mr. Nobles are hurting from the evidence presented in this trial.

Why didn't we bring everybody in the bank to this courtroom? We don't have to bring everybody in that bank to this courtroom. We brought intelligent, ordinary people; possibly we could have brought ten more. Possibly they would have testified to the same thing. Who knows?

* * * * *

[745] In regard to what Mr. Bond did or did not do in this case, there has been a little attempt in this case to introduce some racial remarks of some nature in regard to Mr. Hoffman's testimony. Mr. Bond never testified in the trial as to anything Mr. Hoffman did or did not say to him.

Mr. Hoffman, you heard his testimony, and I submit to you he denied the questions, said, "No," to the questions that were asked by Mr. Allis. If he testified any differently Mr. Bond would have testified in this courtroom to you as to what the inconsistencies were, and Mr. Bond did not so testify. You heard his testimony.

He went out there at 10 minutes to nine in the morning and is trying to pull the wool over your eyes by telling you that these are the lighting conditions in the bank in these photographs. That is the biggest bunch of baloney I have ever heard in my life. You look at them and you compare these photographs with these surveillance pictures which were taken right on the button at the time this robbery happened. Mr. Swain and Mr. Brown lived together in an apartment.

Ladies and gentlemen, if you run with the hounds you can't complain when you wake up with the fleas.

* * * * *

[747] All the FBI has done in this case, ladies and gentlemen, is to investigate it properly to bring you the people that they felt were necessary witnesses. And they have testified under oath as to the truth in this case. To attack the FBI I think is just spitting in the wind, because these young men have nothing to do but to honestly and intelligently investigate these cases and bring you the witnesses.

The FBI has done their job in this case. We ask you to do your job.

[Case No. 12113–Crim (MML), U.S.A. vs. Tommie Brown, et al., Defendant's Exhibit G, Date April 18, 1973, iden., date ..... evid. Clerk, U.S. District Court, Central District of California.

By ———, ———, *Deputy Clerk.*]

DEFENDANT'S EXHIBIT G, SUPPLEMENTAL OFFER OF PROOF, PAGES 1–7

United States District Court, Central District of California

No. 12113–MML–CD

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT LEE NOBLES, DEFENDANT

SUPPLEMENTAL OFFER OF PROOF

EXPERIMENTAL AND SOCIAL PSYCHOLOGISTS' THEORIES

Doctor Buckhout will testify to the theory of recognition and identification which is a recognized theory among experimental and social psychologists. He will testify that, based on scientific experiments, some of which he has conducted himself, there are a number of objective factors, some of them unconscious, which affect the reliability of eyewitness identification testimony.

The following table, extracted from a paper by Doctor Buckhout, summarizes 16 sources of unreliability in eyewitness testimony, backed up by specific research, most of which is beyond the ken of the average laymen and/or juror.

TABLE I

A. The Original Situation
   1. Insignificance of Events
   2. Shortness of Period of Observation
   3. Less than ideal observation conditions
B. The Observer
   4. Stress
   5. Physical Condition of the Observer
   6. Prior Conditioning and Experience

   7. Personal Biases
   8. Needs and Motives—Seeing what we want to see
   9. Desire to be a Part of History
C. Testing for Identification
   10. Length of Time From Event to Test
   11. Filling in Details Which Weren't There
   12. Unfair Test Construction
   13. Suggestions in the Test Situation
   14. Conformity
   15. Relation to Authority Figures
   16. Passing on a Theory: The Self-Fulfilling Prophecy

BASIS FOR HYPOTHETICAL QUESTIONS

I have related to Doctor Buckhout that one witness (Mr. Van Gemeran) testified that he worked as a teller at the bank in question, that the robbery occurred at about 11:30 a.m., that it lasted from 5–7 minutes, that the witness was working at the fourth teller desk from the door, that he was ordered to back up, that he saw defendant Brown leap over the counter go down to the teller's *line,* jump over the counter again and leave. Defendant Brown was wearing the same glasses he had on in court. Brown reportedly was wearing a hat and coat which are in evidence. The witness testified that defendant Brown was standing two feet away from him at one point, that he noticed Brown for about four minutes, that he noticed Brown "the most," that he noticed one of the other robbers, (not Defendant Robert Nobles) who was standing from 4–10 feet from him for approximately one minute. The witness testified that the third robber, (not defendant Robert Nobles) was standing approximately fifteen feet away, while defendant Nobles was about twenty feet from him under the surveillance cameras. The witness does not recall whether defendant Nobles was wearing a hat or a jacket. He saw defendant Nobles from the back and side. Defendant Nobles' back was to the witness most of the time. The witness saw a side view for one-half minute; he testified that he was excited and afraid and that this was his first robbery of any kind. The first time the witness saw defendant Nobles since the robbery was in Court. Defendant was in the front row with the other defendants, he testified that he knew that the defendant was a defendant, and that he was seated behind the defendant and several sections to the side prior to testifying.

Expert Opinion

Doctor Buckhout is qualified to relate the facts presented in the hypothetical to his training and research background and render his opinion as to whether the ordinary human observer would be an unreliable eyewitness under the circumstances described. Based on the facts presented, Doctor Buckhout will testify that in his opinion, the average human observer would be unreliable. In support of this opinion Doctor Buckhout will testify that the facts described an accumulation of sources of unreliability from Table I including:

Shortness of Period of Observation
Stress
Prior Conditioning and Experience (no experience with events by witness)
Length of time from Event to Test.
Unfair Test Construction
Suggestion in the Test Situation

The accumulation of these factors support his opinion that the testimony described is unreliable. Further, in line with the theory of the eyewitness, the facts suggest that the witness was dividing his attention to several events, which usually results in a reduction of efficiency.

Basis For Second Hypothetical

I have related to Doctor Buckhout the following facts concerning the testimony of witness Gary Hoffman: Mr. Hoffman was a visitor in the bank, he was standing in the platform area with his back to the counter during most of the robbery. The robbery reportedly lasted 5–8 minutes. The witness testified that this was the first robbery he had ever been in, that he was afraid, excited, and breathing more heavily than normal, that he noticed the man behind the teller's counter working, that he saw him jump over the counter to the lobby, and that his eyes followed him out the front door. He reportedly knew one of the robbers was to his right but did not focus on him. The witness testified that the robber passed within four to five feet of him as he was leaving and gave him a full view, that the robber in the front of the bank toward the teller's area was at one

time within a few feet of him. The witness' attention was focused on defendant Nobles for approximately two to three minutes. The witness recalls only that defendant Nobles had dark clothing and dark hat. The witness testified that Defendant Nobles had a medium complexion, was young in facial features, had a Negroid nose—slightly larger than average—Negroid lips, roundish as opposed to a long face. The witness did not recall a mustache, goatee, or heavy five o'clock shadow. The witness cannot recall sideburns. He recalls seeing his hat was pulled low, no circles under the defendant's eyes, that the eyes did not droop, and that he could not see the color in defendant Nobles' eyes. The witness testified that defendant Nobles wore no glasses, had no double chin, was somewhat stocky in build. The witness was shown a photo-spread on March 28, and picked out defendant Nobles saying that in his opinion this could very well be the bandit. The witness picked defendant Nobles out of the line-up two days later, and identified defendant Nobles in court on April 12, 1973. At the time of the photo-spread the witness wanted to be accurate, hoped it would not be a waste of time, and hoped he would be able to pick out the robber. At the time of the robbery he was concerned with the safety of other people in the bank.

Expert Opinion No. 2

Based on the facts presented in the hypothetical, Doctor Buckhout will testify that the facts indicate the presence of the following sources of eyewitness reliability selected from Table I.

Shortness of Period of Observation
Stress
Prior Conditioning and Experience
Personal Biases
Unfair Testing
Suggestions in Test Situation

On the basis of the accumulation of the above factors, Doctor Buckhout will testify that in his opinion, the eyewitness testimony is unreliable.

Doctor Buckhout, as an expert on the *testing* of eyewitness identification, will be shown the photographs used in the photo-

spread on which the identification of defendant Nobles was made. When asked if such a photo-spread is a "fair test," Doctor Buckhout will testify that in his opinion, it is not. He will point out specific deficiencies in the photo-spread including:

1. The photo of the defendant stands out as unique item.
2. Four out of six photos show a person with a civilian sport shirt while defendant's picture and one other do not.
3. Three of the six photos show very dark skinned persons—which logically excludes their consideration by a witness who is looking for a light-skinned black male.
4. Defendant Nobles' picture is one of two photos which show a clean-shaven face. Four other photos show hair—another biasing factor leaning toward the defendant.

The net effect of these errors in the photo-spread is, in Doctor Buckhout's opinion, to render the photo-spread test unfair, since it leads the witness to exclude from consideration 4–5 of the photos of persons other than the defendant. Instead of it being a test of 1 out of 6, it is a far easier test of 1 out of 2. If a witness were influenced by the uniqueness of the defendant Noble's photo, it would not be a test at all.

Doctor Buckhout will be asked his opinion of the *sequence* of test: photo-spread, line-up and incourt identification—an area of expertise clearly beyond that of the average juror and/or layman. Doctor Buckhout will testify that in his opinion, the line-up identification is clearly unreliable because the witness has effectively been coached on the correct answer by having previously picked out a photo of defendant Nobles. Such a lineup is an unfair test in Doctor Buckhout's opinion.

Further, Doctor Buckhout will testify that the same weakness affected the in-court identification. Doctor Buckhout will testify that the in-court identification test was unfair because Mr. Nobles was clearly identifiable as a defendant. In his opinion, in-court identifications are generally unreliable (even though formally necessary) because of prior knowledge and the suggestiveness of the defendant's seating position in court. Doctor Buckhout will also testify that the description given by witness Hoffman that the nose of the robber was "Negroid," indicates that such a witness relies on such sterotype features

in remembering Black people and that this can effect the reliability of the identification. Recent research shows that white people are less reliable in identification of Black people.

Respectfully submitted,

JOHN K. VAN DEKAMP,
Federal Public Defender.

By Nicholas R. Allis,
NICHOLAS R. ALLIS,
Deputy Federal Public Defender.
Attorneys for Defendant,
ROBERT LEE NOBLES.

Dated: April 17, 1973.

[Received June 27, 10:27 a.m. 1973, U.S. Marshal Service, Los Angeles, California]

United States District Court for the Central District of California

No. 12113—Criminal

UNITED STATES OF AMERICA

v.

ROBERT LEE NOBLES

Judgment and Commitment (Rec. 2-68)

On this 21st day of May, 1973 came the attorney for the government and the defendant appeared in person and with his appointed counsel, Nicholas Allis, Deputy Federal Public Defender.

It is adjudged that the defendant upon his plea of Not Guilty and a Verdict of Guilty has been convicted of the Offense of Robbery of a National Bank and use of a Dangerous Weapon, in violation of Title 18 United States Code, section 2113(a)(d) as charged in the Indictment filed the 5th day of March, 1973, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of twenty-five (25) years.

It is adjudged that the defendant shall become eligible for parole under Title 18 United States Code, section 4208(a)(2), at such time as the Board of Parole may determine.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or

other qualified officer and that the copy serve as the commitment of the defendant.

MALCOLM M. LUCAS,
United States District Judge.

Filed: May 21, 1973, Edward M. Kritzman, Clerk, by Duane K. Hostetter, Deputy Clerk.

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full and correct copy of the original on file in my office, and in my legal custody.

EDWARD M. KRITZMAN, *Clerk,*
United States District Court.

By ———, ———,
Deputy Clerk.

Dated June 1, 1973.

[Filed, June 27, 1973, Clerk, U.S. District Court, Central District of California By Deputy.]

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on ———— to ————.
Defendant noted notice of appeal on ————.
Defendant released on ————.
Defendant's appeal determined on ————.
Defendant delivered on June 22, 1973, to USP–McNeil Isl. at Steilacoom, Wash., the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

EVERETT R. LANGFORD,
United States Marshal,
District of Oregon.

By ———, ———,
Deputy.

Dated June 22, 1973.

Supreme Court of the United States

No. 74–634

UNITED STATES, PETITIONER
v.
ROBERT LEE NOBLES

Order Allowing Certiorari. Filed January 20, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

U.S. GOVERNMENT PRINTING OFFICE: 1975